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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1470

RICHARD CECIL WILSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

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RICHARD CECIL WILSON,

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THE UNITED STATES OF AMERICA,

Respondent

PETITION

MAY IT PLEASE THE COURT:

The Petition of Richard Cecil Wilson, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This cause originated in the United States District Court for the Northern District of Indiana, South Bend Division, the jurisdiction of that Court having been invoked by the return of an indictment in one count, charging the Petitioner herein with having received and concealed two (2) barrels of whiskey which were a part of a foreign shipment of freight moving from Walkerville, Ontario, Canada, to

Vera Cruz, Mexico, said indictment based upon Title 18, Section 409, U. S. C. A. Rec. Page One (1) Title 18, Sec. 409, U. S. C. A.

A jury having been waived by the parties, a trial was had before the Court without the intervention of a jury, Honorable Luther M. Swygert presiding. (Rec. page 21).

By agreement of the parties a stipulation was admitted in evidence, in which it was stipulated and agreed as follows:

"That on March 15, 1946, H. Walker and Sons, Limited, shipped via Canadian National Railways from Walkerville, Ontario, Canada, in car CM-472674, under Waybill 2734, 120 barrels of whiskey (in bond) and 13 drums of gin: that the aforementioned shipment was a foreign shipment moving from Walkerville, Ontario, Canada, destined for Vera Cruz, Mexico"—that said stipulation was made and agreed upon for the purpose of identifying Waybill 2734 (Rec. Pages 2 and 3).

At the conclusion of the Government's evidence this Petitioner filed and presented his Motion to Dismiss and which motion was overruled by the Court (Rec. Page 21), (Appendix "B" Petitioner's Brief).

And this Petitioner then rested without the introduction of evidence (Rec. Page 22).

And this Petitioner was found guilty of the offense charged in the indictment (Rec. Page 22).

And this Petitioner filed and presented his motion in arrest of judgment and which motion was overruled by the court (Rec. Page 23), (Appendix "C" petitioner's brief).

And thereafter judgment entered upon the finding of the Court (Rec. Page 25).

An appeal was thereafter perfected to the United States Circuit Court of Appeals for the Seventh (7th) Circuit, and the judgment of the District Court affirmed (Rec. Pages 45-46) and thereafter a Petition for rehearing filed and

said Petition denied on the Twelfth (12th) day of May, 1947 (Rec. Page 49).

B

Reasons Relied On for the Allowance of the Writ

1

That the Court below, in its opinion, has decided an important question of general law in a way probably untenable.

2

That the Court below, in its opinion, has decided an important question of general law in conflict with the weight of authority.

3

That the Court below, in its opinion, has decided an important question of federal law which has not been, but should be, settled by this Court.

4

That the Court below, in its opinion, has decided a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9238, United States of America, Plaintiff-Appellee, *vs.* Richard Cecil Wilson, Defendant-Appellant, and that the said judg-

ment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

Respectfully submitted,

H. K. CUTHBERTSON,
WALTER J. BIXLER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1470

RICHARD CECIL WILSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF

I

The opinion in the Circuit Court of Appeals for the Seventh Circuit has not been officially reported as of the date of filing this brief. The title of the case, number and date of the opinion is as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Number 9238

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD CECIL WILSON,

Defendant-Appellant

Dated April 23, 1947

(Trans. Rec. Page 45)

NOTE: For the convenience of the Court, the above opinion is set out in full in Appendix "A" to this brief.

II

Jurisdiction

A

The statutory provision sustaining the jurisdiction of this Court, is found in Section 240, Judicial Code, as amended by the Act of June 7th, 1943, 48 States 926.

B

The date of the judgment to be reviewed is April 23, 1947 (R. 45) and a rehearing denied on May 12, 1947 (R. 49).

C

This is a criminal action in which the jurisdiction of the United States District Court for the Northern District of Indiana, South Bend Division was invoked by the return of a Grand Jury Indictment in one Count (R. "1"). (Indictment Appendix "B".)

A trial was had and evidence by the Government begun and concluded and the Government rested (R. 21).

Defendant (petitioner) filed and presented his Motion to Dismiss (R. 21) (Motion, Appendix "C").

Motion to Dismiss overruled (R. 21) to which ruling the Defendant (petitioner) at the time excepted (R. 22).

And a finding of guilty, as charged in the indictment (R. 22).

And the defendant (petitioner) filed and presented his Motion in Arrest of Judgment (R. 22-23) (Motion in Arrest of Judgment, Appendix "D") which motion was overruled by the Court to which ruling the defendant (petitioner) at the time excepted (R. 26) and judgment entered upon the finding of guilty (R. 25-26).

An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court affirmed (R. 45) and a rehearing denied (R. 49).

D

This Petitioner respectfully submits that he believes the following authorities sustain the jurisdiction of this Court to issue the writ prayed for in the Petition. Section 240, Judicial Code, as amended by the Act of June 7, 1934, 48 States 926. *United States of America* v. *Gulf Refining*, 268 U. S. 542, 69 L. Ed. 1082-1085.

III

Statement of the Case

NOTE:

A full statement of the case has been given under heading "A" in the Petition to which reference is hereby made.

IV

Specification of Errors

First

The District Court was without jurisdiction over the subject matter of this action.

Second

The District Court erred in denying Petitioner's (Defendant's) motion for dismissal made at the close of the evidence.

Third

The Court erred in overruling Petitioner's (defendant's) Motion in Arrest of Judgment.

Fourth

That the finding of the District Court is contrary to the weight of the evidence.

Fifth

The finding of the District Court is not sustained by substantial evidence.

V

Summary of the Argument

A

The main question in this case lies within narrow limits. The United States claims the right to punish, as a criminal offense, under Title 18, Section 409, U. S. C. A., the receiving and concealing of two barrels of whiskey under the following circumstances: from a shipment of freight moving from Walkerville, Ontario, Canada, to Vera Cruz, Mexico, the consignor being H. Walker and Sons, Limited, of Walkerville, Ontario and the ultimate consignee to whom the shipment was sold was Productos Internacionales Avenida Juarez, 36 Aparada, 7076 Mexico, D. F. Mexico, said shipment being moved under bond by authority of the Treasury Department of the United States.

Your Petitioner contends that Title 18, Section 409, U. S. C. A. has no application to a shipment from one foreign country to another and that such a shipment under which Congress has the right, or the power to legislate under the power conferred upon Congress by Article I, Section 8, Clause 3, of the Constitution of the United States and we respectfully submit that each of the separate and several specifications of errors, call into question the issue as above stated.

We have prepared this brief with the view of the presentation of this one question, which we respectfully submit

as most applicable to each of the errors specified, and we have pursued that method of presentation with a view in mind of eliminating any confusion, by way of repetition, to the end that this case may be presented in the most simplified manner.

We have adopted the theory above outlined as the result of the suggestion we find in the opinion of this Court in *U. S.* v. *Steffens*, 100 U. S. 82, 25 L. Ed. 550, commencing at Special Page 552, in which this Court said in referring to the question presented in that case,

> "In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case at hand. That such has been the uniform course in this Court in regard to statutes passed by Congress will readily appear to anyone who will consider the vase amount of argument presented to us assailing such statutes as unconstitutional, and will count, as he may do on his fingers, the instances in which this Court has declared an Act of Congress void for want of Constitutional power."
>
> *U. S.* v. *Steffens.*

Point One

A

Power of Congress:—The Constitution of the United States provides, "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

> Constitution of the United States, Article I, Section 8, Clause 3.

B

The Indictment in this case was returned by the Grand Jury on the claimed authority of Title 18, Section 409, U. S. C. A., which section of the Criminal Code makes it a crime,

among other things, to conceal or receive any goods or chattels which were a part of, or, which constituted an interstate or foreign shipment of freight or express, etc., knowing the same to have been stolen.

Title 18, Section 409, U. S. C. A.

C

Section 409 of Title 18, U. S. C. A. is a part of Chapter 9 of Title 18 of the Criminal Code and the many sections of the Criminal Code defining crimes having to do with interstate or foreign commerce were enacted under an enacting clause which reads as follows:

> CHAPTER 9:—"Offenses Against Foreign and Interstate Commerce." Title 18, Chapter 9, U. S. C. A.

D

Title 18, Section 411, U. S. C. A. conclusively shows the intent of Congress to confine the transactions prohibited under Section 409 and under Chapter 9 of Title 18 to interstate or foreign commerce, and which section reads as follows:

> *Proof of Character of Shipments:*—"To establish the interstate or foreign commerce character of any shipment in any prosecution under Section 409 of this title the way bill of such shipment shall be prima facie evidence of the place from which and to which such shipment was made."

Title 18, Chapter 9, Section 411, U. S. C. A.

E

Congress itself in the enactment of an amendment to Title 18, Sections 409 to 411, recognized, that Title 18, Section 409 related to interstate or foreign commerce and this recognition in House Report No. 1116 of the House Committee

on Judiciary in which Committee report is found the following comments:

> "The Committee on the Judiciary, to whom was referred the bill (H. R. 4180) to amend the law relating to larceny in interstate or foreign commerce having considered the same, report the bill favorably to the House, with amendments, with recommendations that, as amended the bill do to pass."
>
> House Report No. 1116, Oct. 10, 1945. Laws of 79th Congress, 1946—U. S. Code #6, Congressional Service Advance Sheet, Page 2-237.

F

On July 24, 1946, the bill above referred to became a law under the following title, "An act to amend the law relating to larceny in interstate or foreign commerce," and in that amendment Congress re-enacted Title 18, Section 411, under sub-division 3 of said amendment.

> Title 18, Chapter 9, Sections 409 to 411, U. S. C. A. as amended July 24, 1946.

G

The construction of a statute will be preferred which brings into concord the title of the act and the purpose stated by the report of the legislative committee where the act originated as that which was intended to be accomplished.

> *William Cramp & Sons, etc.* v. *International Curtis Machine Turbine Co.*, 246 U. S. 28, 62 L. Ed. 560.

H

Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign Governments as individuals.

> *U. S.* v. *Holliday*, 70 U. S. 407, 18 L. Ed. 182-185.
> *U. S.* v. *Steffens*, 100 U. S. 821, 25 L. Ed. 550-552-553.

I

Commerce between the States consists of intercourse and traffic between their citizens.

Glouchester Ferry Co. v. *Commonwealth of Penn.* 114 U. S. 203, 29 L. Ed. 158-162.
U. S. v. *Steffens,* 100 U. S. 821, 25 L Ed. 550-552-553.

J

An illustration of foreign commerce is where goods are shipped from a seller in the United States to a buyer in Canada.

Levin v. *Fisher,* 217 Mich. 681, 187 N. W. 328.

K

The shipment in question was not a shipment in either interstate or foreign commerce but transportation from one foreign country destined to another foreign country and through the United States in bond under authority of the Treasury Department of the United States and under regulations by the Secretary of the Treasury and in custody of the Customs Officers.

Title 19, Section 1553, U. S. C. A.

L

The Power of Congress to regulate interstate commerce cannot be extended beyond the literal word of the Constitution, and cannot be expanded to extend to regulations which only remotely or indirectly affect interstate commerce.

U. S. v. *Mills,* 7 Fed. Supp. 547.
U. S. v. *Mills,* 77 Fed. 2nd 1019.

M

While Courts do not ordinarily construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written; however, whatever meanings "commerce" may have included in 1787 the dictionaries, encyclopedias, and books of the period, show that included trade, business in which persons bought and sold, bargained and contracted, and this meaning has persisted to modern times.

U. S. v *S. E. Underwriters Ass'n.*, 232 U. S. 533, 88 L. Ed. 1440.

N

If Section 409 of Title 18,U. S. C. A. is to be construed as applicable only as applied to commerce with foreign nations, among the several States, or with the Indian tribes, then the Indictment in this case, returned under the purported authority of Title 18, Section 409, U. S. C. A., fails to state an offense under Title 18, Section 409.

U. S. v. *Steffens,* 100 U. S. 821, 25 L. Ed. 550, 552, 553.

O

If Title 18, Section 409, U. S. C. A. is to be construed as applicable only as applied to commerce with foreign nations, among the several States, or with the Indian tribes, then the evidence in this case not only fails to prove a violation of said section but conclusively shows that the Petitioner (defendant) could not be guilty of a violation of that Section.

U. S. v. *Steffens,* 100 U. S. 821, 25 L. Ed. 550, 552, 553.

Points Two (2) to Eight (8) Each Inclusive

Under the following points, two (2) to eight (8) each inclusive, this petitioner wishes to respectfully point out the errors of the Honorable Circuit Court of Appeals, in the reasoning of that Court in affirming the judgment of the District Court, in support of the Petition for a Writ of Certiorari to the end that this Honorable Court may exercise its supervisory powers to correct those errors and to also justify a reversal of the judgment of the District Court.

Point Two

A

The opinion of the Circuit Court of Appeals held that the defendant (petitioner herein) was found guilty of having received and concealed two barrels of whiskey which had been a part of a shipment moving in "foreign commerce," thereby holding that a shipment from Walkerville, Ontario, Canada, to a consignee at Vera Cruz, Mexico, constitutes "foreign Commerce."

Paragraphs One and Two.
Opinion Circuit Court of Appeals.
Appendix "A" this brief.
Specification "B".

B

The Circuit Court of Appeals recognized that there is but one question in this case, viz; as to whether or not the shipment in question was a shipment in foreign commerce.

Opinion Circuit Court of Appeals.
Appendix "A" this brief.

C

In referring to the case of *United States* v. *Philadelphia & Reading R. Co.*, 188 Fed. 484, the opinion of the Circuit Court of Appeals says:

"From the facts it is clear that that case has no application to the instant case."

Opinion Circuit Court of Appeals.
Appendix "A" this brief.

D

The facts in the case of *U. S.* v. *Philadelphia & Reading R. Co.*, 188 F. 484, as to the nature of the shipments in that case, is identical with the facts as to the nature of the shipment in the case at bar as shown by the opinion of the Circuit Court of Appeals, as follows:

> "The shipment originated in Germany, destined to Philadelphia for transportation to Canada. A steamship carried it across the ocean to Philadelphia. There it was loaded in bond upon railway cars and transported to Alberta, Canada" Opinion of Circuit Court of Appeals, Appendix "A."

E

In the case at bar it is held by the Circuit Court of Appeals that the facts were as follows, to-wit:

> "H. Walker & Sons, Limited, shipped in bond through the United States from Walkerville, Ontario, Canada, 120 barrels of whiskey under a way bill providing for the delivery of the whiskey to the consignee at Vera Cruz, Mexico" Opinion Circuit Court of Appeals, Appendix "A."

F

From the above facts it is clear that the nature of the shipment in the case of *U. S.* v. *Philadephia & Reading*

Ry. and the case at bar are identical as far as the question is concerned as to whether or not the shipment in the case at bar constituted a shipment in foreign commerce.

G

The source of the power of Congress to enact the Elkins Act and the source of the power of Congress to enact 18 U. S. C. A. Section 409 is derived from and the authority found in Article I, Section 8, Clause 3, of the Constitution of the United States which provides, "That Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Article I, Section 8, Clause 3, U. S. Constitution.

18 U. S. C. A., Section 409, Appropriate Portions Appendix E.

49 U. S. C. A., Section 41 (Elkins Act), Appropriate Portions, Appendix F.

H

The one phase of the shipments that is present in both the cases of *U. S.* v. *Philadelphia & Reading Ry.*, and the case at bar is the very thing and the very point that makes the case of *U. S.* v. *Philadelphia & Reading Ry.*, in point with the case at bar and that is found in the fact that the transaction and shipments in each case did not constitute interstate or foreign commerce and this proposition of law is sustained by the very cases cited by the Circuit Court of Appeals in its opinion in the case at bar, as follows:

The case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 194 (22 U. S. 1, 188) which was an opinion written by Chief Justice Marshall and in which is found the following statement:

> "If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may terminate at a port within a State, then the power of Congress may be exercised within a State,"

thereby holding that in order to constitute foreign commerce, a shipment must commence or terminate at a place within the United States.

Gibbons v. *Ogden*, 9 Wheat. 1, 190 (22 U. S. 1, 188).

I

The shipment in the case of *U. S.* v. *Philadelphia & Reading Ry.*, commenced in Germany and terminated in Canada.

Indictment Rec. Page One (1), Opinion Circuit Court of Appeals, Appendix "A."

J

The case of *U. S.* v. *Philadelphia & Reading R. Co.* was a criminal action and a prosecution under Section 41, 42, 43, Title 49, U. S. C. A., known as the Elkins Act, for allegedly and unlawfully claiming rebates for a shipment of sugar which shipment originated in Hamburg, Germany, destined as the bill of lading stated, to Philadelphia for a transportation in bond to Raymond, Alberta, Canada and it was taken to its destination by a continuous and uninterrupted transportation by successive carriers. A steamship company carried it across the Atlantic Ocean to Philadelphia. Here it was loaded in bond upon railway cars and was transported over the connecting lines of successive carriers until it reached Alberta, Canada, the point of ultimate destination. Philadelphia & Reading R. Co. carried it over part of the route at a less rate than would have been lawful if the shipment had originated in Philadelphia, and it was the charging of that rate that was alleged in the indictment to be a criminal offense.

U. S. v. *Philadelphia & Reading R. Co.*

K

The facts in the case of *U. S.* v. *Philadelphia & Reading R. Co.* were submitted to the U. S. District Court under a

stipulation, undoubtedly because there was a doubt in the mind of the Department of Justice as to whether or not the Elkins Act, passed by Congress under the authority and the power granted by the Commerce Clause of the Constitution, could be so construed and still stand within the four walls of that clause of the Constitution, as applicable to a movement of freight under the circumstances and in the manner outlined in that case.

L

And the one question that was before the court in the case cited was as follows: "Does the Elkins Act concerning interstate commerce apply to the continuous transportation of goods from a foreign country to another foreign country, if such goods are merely carried in bond across two or more States of the Union?"

U. S. v. *Philadelphia & Reading R. Co.*

M

The District Court, in that case decided, that no offense, under the facts stated in the stipulation (the offense charged in the indictment), had been proven, and in that opinion the Court held that the Elkins Act did not attempt to regulate such a transaction at all and that the defendant could not be convicted of an offense under the indictment for taking part in such a carriage.

U. S. v. *Philadelphia & Reading R. Co.*

N

We respectfully submit that the facts in the case of the *U. S.* v. *Philadelphia & Reading R. Co.* and the facts in the case at bar are so parallel that there cannot be found one distinguishing point between them.

U. S. v. *Philadelphia & Reading R. Co.*
Opinion Circuit Court of Appeals.

Appendix "A."
Indictment, Rec. Page 1.

O

The case we are now discussing, *U. S.* v. *Philadelphia & Reading R. Co.*, has been approved by this Court and in the case of *Galveston, Etc., R. Co.* v. *Woodbury, et al.*, 254 U. S. 357-58, 65 L. Ed. 301-303, where this Court had under consideration the transportation of a person and her baggage, travelling on a coupon ticket purchased at Timmins, Ontario from a Canadian Railroad entitling her to travel over it and connecting lines from Timmins, Ontario, to El Paso, Texas, and return, apparently with stop-over privileges, and this Court held that such transportation did constitute commerce and was governed by the Act to regulate commerce and that her so journeying in the United States from one state to another constituted interstate commerce and in passing upon that question, this Court said, "The case, which holds that the Act does not govern shipments from a foreign country in bond through the United States to another place in a foreign country, whether adjacent or not, are not in point," and said, "Compare U. S. *v.* Philadelphia & Reading R. Co., 188 Fed. 484." There can be no question but what the language above quoted by this Court is an approval of the case of *U. S.* v. *Philadelphia & Reading R. Co.*

Galveston, etc., R. Co. v. *Woodbury, et al.*
U. S. v. *Philadelphia & Reading R. Co.*

POINT THREE

A

The case of *U. S.* v. *Coombs*, 12 Peters 72 (37 U. S. 71), cited by the Circuit Court of Appeals could not be in point for the reason that the prosecution in that case was for

stealing from a wrecked ship bound from a foreign port to the United States of America and engaged in transporting goods in foreign commerce, to-wit, from a foreign country destined for the United States.

U. S. v. *Coombs,* 12 Peters 72 (37 U. S. 71).

Point Four

A

The case of Second Employers' Liability Cases, 223 U. S. 1-7, is a case that strongly supports the contention of the petitioner (defendant) in this case and the Circuit Court of Appeals made a misapplication of that case in support of the reasoning of this Honorable Court in the case at bar.

Second Employers' Liability Cases, 223 U. S. 1-7.

B

It is found in the case of Second Employers' Liability Cases that the one fact alone that upheld the Employers' Liability Act was the fact that it had application only to employees of a railroad or other transportation facilities who were engaged themselves, as employees, in interstate commerce or foreign commerce and in order to uphold the Constitutionality of that act the construction placed upon that act was that it had no application to employees of a transportation system not engaged in interstate or foreign commerce and the benefits of that act could not be applied to employees of a transportation system who were not actually engaged in interstate or foreign commerce at the time of an injury or death.

Second Employers' Liability Cases, 233 U. S. 1-7.

Point Five

A

The case of *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270 cited by the Circuit Court of Appeals is most assuredly a misapplication of the reasoning and law in that case in support of the judgment of that honorable court but to the contrary the case of *Henderson* v. *Mayor of New York* supports the contention and position of this petitioner (defendant) in the case at bar, that the shipment referred to in the indictment in this case was not a shipment in foreign commerce or interstate commerce, wherein this Honorable Court in that case said "Commerce among foreign nations means commerce between the citizens of the United States and citizens or subjects of foreign governments," citing *U. S.* v. *Holliday*, 2 Wall. 417, 18 L. Ed. 185. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270.

B

There is nowhere in the evidence in the case at bar where there can be found where any citizens of the United States had anything to do with the transaction in the case at bar or where they were in any way interested, in the way of a commercial adventure, exchange of goods or otherwise, with any citizens or subjects of Canada or Mexico.

Rec. Pages 2 to 19, Inclusive.

Cross Ex. Karl L. Decker, Rec. Pages 4 & 5.

Point Six

A

The case of *Gibbons* v. *Ogden* cited in the opinion of the Circuit Court of Appeals is not applicable to the ultimate

finding of that court in affirming the judgment of the court below but in reality is more applicable to the contention of this petitioner (defendant) that the act of Congress under the authority upon which the indictment in the case at bar was found and returned and upon which the petitioner (defendant) was found guilty, has no application to the facts in the case at bar, in other words, the shipment as shown by the evidence in this case was not a shipment in foreign commerce. The very apt words used by Chief Justice Marshall in the case of *Gibbons* v. *Ogden* are decisive of the question in the case at bar in favor of the petitioner (defendant) and which are in the words following to-wit:

> "But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. EVERY DISTRICT HAS A RIGHT TO PARTICIPATE IN IT. * * * If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, *if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.*" (Italics ours.)
>
> *Gibbons* v. *Ogden,* 9 Wheat. 1, 190 (22 U. S. 1, 188).

B

In the case of *U. S.* v. *Holliday,* 70 U. S. 407, 18 L. Ed. 182-185, this Court, in citing the case of *Gibbons* v. *Ogden* said, Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden,* to which we so often turn with profit when this clause of the Constitution is under consideration, said, "Commerce is undoubtedly traffic, but it is something more,

it is intercourse," and after referring to the Constitution of the United States the Court continued:

> "Congress shall have the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

Commerce With Foreign Nations, Without Doubt, Means Commerce Between Citizens of the United States and Citizens and Subjects of Foreign Governments, as Individuals. And then the Court adopts that same meaning as applied to commerce with the Indian tribes, as meaning commerce with individuals composing those tribes and takes that meaning as so applied from the opinion of Chief Justice Marshall in the case of *Gibbons* v. *Ogden*. We respectfully submit that the Circuit Court of Appeals erred in its misapplication of the reasoning in the case of *Gibbons* v. *Ogden* in sustaining the government's contention in the case at bar.

U. S. v. *Holliday*, 70 U. S. 407, 18 L. Ed. 182-185.

C

And again in the case of *U. S.* v. *Steffens*, 100 U. S. 821, 25 L. Ed. 550-552, this Court laid down the identical principle as found in the case of *U. S.* v. *Holliday* and held in that case that "While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and subjects or citizens of foreign nations," etc., and then said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several states, or with the Indian tribes. IF IT IS

NOT SO LIMITED, IT IS IN EXCESS OF THE POWER OF CONGRESS."

U. S. v. *Holliday,* 70 U. S. 407, 18 L. Ed. 182-185;
U. S. v. *Steffens,* 100 U. S. 82, 25 L. Ed. 550-552.

D

We most respectfully submit that under the facts in the case at bar and by the affirmance of the judgment of the lower court, the Circuit Court of Appeals has placed a construction upon 18 U. S. C. A., Section 409, that makes that act of Congress in excess of a power of Congress and under the judgment of this Court, the act would be unconstitutional.

U. S. v. *Steffens;*
U. S. v. *Holliday.*

POINT SEVEN

A

The case of *Hanley* v. *Kansas City Southern Railway Company,* 187 U. S. 617-619, cited in the opinion of the Circuit Court of Appeals is certainly not applicable to any question decided in the case at bar and more particularly could not be applicable in deciding any question of law supporting the judgment of that Honorable Court in affirming the judgment of the lower court.

Hanley v. *Kansas City Southern R. Co.,* 187 U. S. 617-619.

B

The case of *Hanley et al.* v. *Kansas City Southern Railway Company* had to do with the question of the power of the railway commissioners of Arkansas to fix and enforce certain rates to be charged by the Kansas City Southern Railway Company for the movement of freight over the line

running through certain parts of the State of Missouri, the State of Arkansas, and the Indian Territory, and Texas, and this Honorable Court in that case made the following very significant statement.

"It may be assumed further, as applied by the language quoted, that the transportation in the present case was commerce," the transportation of goods or freight in interstate commerce.

Hanley et al. v. *Kansas City So. R. Co.*

C

While the case of *Hanley* v. *Kansas City Southern Railway Company* had to do solely with freight rates in interstate commerce, the facts in the case at bar conclusively show that the railroad companies handling the car in which the liquor was alleged to have been stolen was not transporting that liquor (merchandise) in either interstate commerce or in foreign commerce.

Hanley et al. v. *Kansas City So. R. Co.*
U. S. v. *Philadelphia & Reading Ry.*
U. S. v. *Holliday.*
U. S. v. *Steffens.*
Gibbons v. *Ogden.*
Second Employers' Liability Cases.
U. S. v. *S. E. Underwriters Ass'n.*

D

If the case of *Hanley* v. *Kansas City Southern Railway Company* has any bearing on the case at bar, such bearing or applicability of that case to any question in the case at bar could only support the case of *U. S.* v. *Philadelphia & Reading Ry. Co.* as demonstrating the fact that interstate or foreign commerce must be the basis of the transportation in order to confer upon Congress the power of regulation and

more particularly the power to define a crime growing out of the theft of goods moving in either interstate or foreign commerce.

Hanley v. *Kansas City Ry. Co.*

U. S. v. *Philadelphia & Reading Ry. Co.*

POINT EIGHT

A

That the Circuit Court of Appeals erred in holding, as applied to the facts in the case at bar, that, "The railroads of the United States are engaged in trade," that is, "The transportation of property, and Congress can enact laws to protect a shipment of goods transported across the United States from Canada to Mexico."

Opinion Circuit Court of Appeals, Appendix "A" Last Page.

B

"Commerce" and "transportation" convey different meanings; "commerce" covering the field of which "transportation" is only a part, since the business of the railroads is not to carry on commerce generally, but to transport persons and things in commerce.

Seagle v. *Missouri-Kansas-Texas Ry Co.* (Mo.) 119 S. W. 2nd 376-379.

C

The question in the case at bar is not what character of business the railroads are engaged in generally but what was the character of the shipment in the case at bar, whether in interstate or foreign commerce.

Chicago & N. W. Ry. Co. v. *Bolle,* 284 U. S. 74-78, 76 L. Ed. 163-176.

D

The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce and the test in the case at bar is whether or not the railroad that transported the whiskey in question was engaged in transporting property in foreign commerce.

E

A common law larceny or receiving stolen property is not in itself a federal offense, over which the Federal Courts have jurisdiction. It is an offense only when at the time of the theft, the property was a part of interstate or foreign commerce.

Kelley v. *United States,* 116 Fed. 2nd 966-968.

Conclusion

In order to clarify the position of this Petitioner, we beg of this Honorable Court to allow us to point out that we are not asking this Court to declare Title 18, Chapter 9, Section 409, U. S. C. A., unconstitutional, but are asking this Court to hold that Act constitutional by placing a construction upon that Act, in conformity with the intent of Congress, that will limit the application of that Act to a regulation of and prohibition of acts and conduct relating to that commerce contemplated by the Constitution and under the Commerce Clause thereof and we wish to set out in this argument, and as a part thereof, the very words of this court in the case of *U. S.* v. *Steffens,* above referred to, and which we feel are most applicable to the case at bar and is decisive of the question presented in this appeal and which reads as follows:

"Governed by this view of our duty we proceed to remark that a glance at the commerce clause of the Con-

stitution discloses at once what has been often the subject of comment in this Court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes; and while bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress."

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

U. S. v. *Steffens.*

One of the most significant statements that we find in the opinion in the case of *U. S.* v. *Steffens* above quoted is that statement where this Court, after defining commerce among the several States; commerce with foreign nations, or with the Indian Tribes as being commerce between citizens of the United States and citizens and subjects of foreign nations as applied to foreign commerce and as applied to interstate commerce, commerce between individual citizens of different States, "If it is not so limited, it is in the excess of the power of Congress. And if its main purpose be to estab-

lish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce only between citizens of the same States it is obviously the exercise of a power not confided to Congress." If commerce under the commerce clause of the Constitution, cannot regulate commerce wholly between citizens of the same State, in this United States, by the same token, it is beyond the power of Congress, under the commerce clause of our Constitution, to regulate commerce between citizens of foreign countries, and that question has been decided in the case of *U. S.* v. *Philadelphia & Reading R. Co.*

It does not do to say that there could be any distinction between the construction placed upon the Elkins Act, as compared to Section 409 of Title 18, for the reason that each of those acts emanate from the authority and the power conferred upon Congress, to legislate under the commerce clause of our Constitution and we most respectfully submit that the reasoning of this Court in the case of *U. S.* v. *Steffens* is still the law of the land as evidenced by the words of Justice Black in the more recent case of *U. S.* v. *S. E. Underwriters Assn.*, 232 U. S. 533, 88 L. Ed. 1440, where he said, speaking for this Court, "Whatever meanings 'commerce' may have included in 1787 the dictionaries, encyclopedias, and the books of the period, show that included trade, business in which persons bought and sold, bargained and contracted, and this meaning has persisted to modern times."

We most respectfully submit that nowhere in the evidence in this case can be found a single fact from which even an inference can be drawn that any person within the United States of America, the District of Columbia, or even any citizens of this country in any of our possessions, had anything to do, whatsoever, with the business pertaining to the purchase and sale of the whiskey that is referred to

in the Indictment in this case and in the evidence in this case, but that the transaction in its entirety was a transaction between citizens of two foreign countries and that there is not one conceivable theory, under our Constitution, or any construction that has been placed upon the commerce clause of our Constitution, that could sustain a finding that the transaction involved in the case at bar was a transaction in foreign commerce or commerce between the States as defined in the authorities cited in this brief.

IT IS, THEREFORE, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in order that the errors of the Circuit Court of Appeals be corrected in conformity with prevailing opinions and judgments of this Court and that to such an end a writ of certiorari should be granted by this Court, addressed to the Circuit Court of Appeals for the Seventh Circuit and that the judgment of the Circuit Court of Appeals and the District Court of the United States for the Northern District of Indiana be finally reversed.

HARRY K. CUTHBERTSON,
WALTER J. BIXLER,
Counsel for Petitioner.

APPENDIX A

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1946, APRIL SESSION, 1947

No. 9238

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs.

RICHARD CECIL WILSON, *Defendant-Appellant*

Appeal from the District Court of the United States for the Northern District of Indiana, South Bend Division

April 23, 1947

Kerner and Minton, Circuit Judges, and Briggle, District Judge

KERNER, Circuit Judge:

The defendant, in a case tried by the court without a jury, was found guilty of having received and concealed two barrels of whiskey which had been a part of a shipment moving in foreign commerce. The indictment in one count was based on 18 U. S. C. A. Sec. 409. That section makes it a crime, among other things, to conceal or receive any goods or chattels, knowing the same had been stolen, which were a part of or which constituted an interstate or foreign shipment of freight.

The facts. H. Walker & Sons, Limited, shipped in bond through the United States from Walkerville, Ontario, Canada, 120 barrels of the whiskey to the consignee at Vera Cruz, Mexico. While en route on the Nickel Plate Railroad, at Peru, Indiana, the seal of the railroad car containing the whiskey was broken and two barrels of the whiskey were removed from the car and later sold to the defendant, who knew that the whiskey had been stolen from the railroad car.

On this appeal defendant contends that he cannot be convicted under the indictment. The argument is that Sec. 409 of the statute in question is not applicable here because, so he says, the shipment was not a shipment in foreign or interstate commerce. To accept this argument would mean that the United States cannot protect a train of cars in transit from the Canadian border to the Mexican border. With this contention we cannot agree.

In support of his argument defendant cites the case of United States *v.* Philadelphia & Reading Ry., 188 F. 484. In that case the defendant was charged with carrying goods in foreign commerce and charging a rate which was not the rate mentioned in the schedules filed with the Interstate Commerce Commission for transportation of freight in interstate commerce. The prosecution was under the Elkins Act (49 U. S. C. A. Sec. 41) which provides in part:

> "it shall be unlawful for any * * * corporation to * * * receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, * * *."

The shipment originated in Germany, destined to Philadelphia for transportation to Canada. A steamship carried it across the ocean to Philadelphia. There it was loaded in bond upon railway cars and transported to Alberta, Canada. The defendant carried the shipment over part of the route and charged a rate which was not the rate mentioned in the schedules filed with the Interstate Commerce Commission for transportation of freight in interstate commerce. From the facts it is clear that that case has no application to the instant case.

The Constitution confers upon the Congress the power to regulate commerce with foreign nations, and it has been held that Congress can enact laws protecting commerce moving from one nation to another. United States *vs.* Coombs, 12 Peters 72 (37 U. S. 71). To regulate, in the

sense intended by the Cons-itution, the Court said in the case of Second Employers' Liability Cases, 223 U. S. 1, 47, is to protect trade and intercourse. Commerce in all its branches, Henderson *v.* Mayor of New York, 92 U. S. 259, 270, and includes the transportation of property. Gibbons *v.* Ogden, 9 Wheat. 1, 190 (22 U. S. 1, 188); Hanley *v.* Kansas City Southern Ry., 187 U. S. 617, 619. The railroads of the United States are engaged in trade, that is, the transportation of property, and Congress can enact laws to protect a shipment of goods transported across the United States from Canada to Mexico.

Affirmed.

APPENDIX B

So. Bend Crim 1561

(Title 18, Sec. 409 U. S. C. A.)

UNITED STATES OF AMERICA

vs.

RICHARD CECIL WILSON, Alias DICK WILSON, THOMAS JEFFERSON McDOWELL

The Grand Jury charges:

On or about the 20th day of March, 1946, in the Northern District of Indiana, Richard Cecil Wilson, alias Dick Wilson and Thomas Jefferson McDowell received and concealed two (2) barrels of whiskey which were a part of a foreign shipment of freight moving from Walkerville, Ontario, Canada to Vera Cruz, Mexico, then and there knowing the said whiskey to have been stolen.

A true bill.

LAWSON J. COOKE,
Foreman.

ALEXANDER M. CAMPBELL,
United States Attorney.

APPENDIX C

MOTION TO DISMISS

Comes now the defendant, Richard Cecil Wilson, by and through his attorneys, Walter J. Bixler and H. K. Cuthbertson, and the Government having introduced all of its evidence and having rested its case, now respectfully moves the Court to dismiss this action against this defendant for each of the following separate and several reasons, to-wit:

One

That the evidence of the government is insufficient to sustain a finding of guilty against this defendant.

Two

That the evidence of the Government conclusively shows that this defendant is not guilty of any offense against the laws of the United States.

Three

That the evidence of the Government conclusively shows that this Court has no jurisdiction over the subject matter of this action.

Respectfully Submitted,

WALTER J. BIXLER,
H. K. CUTHBERTSON,
Attorneys for Defendant;
RICHARD C. WILSON.

APPENDIX D

MOTION IN ARREST OF JUDGMENT

The defendant, Richard Cecil Wilson, respectfully moves the Court to arrest the judgment.

One

That the indictment does not state facts sufficient to constitute an offense against the United States.

Respectfully Submitted,

WALTER J. BIXLER,
H. K. CUTHBERTSON,
Attorneys for Defendant;
RICHARD C. WILSON,

APPENDIX E

APPROPRIATE PORTIONS OF TITLE 18, CHAPTER 9, SEC 409 U. S. C. A.

Sec. 409. Larceny, etc., of Goods in Interstate or Foreign Commerce; Penalty. Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or whoever shall steal or unlawfully take, carry away or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicle, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen, etc. * * * shall in each case be fined, * * * etc. * * *.

APPENDIX F

APPROPRIATE PORTIONS OF THE ELKINS'S ACT (TITLE 49, SEC. 41 U. S. C. A.)

"It shall be unlawful for any person * * * to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in any respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall be any device whatever be transported at a less rate than that named in the published tariffs published and filed by such carrier.